

In re: SANFORD SKARSTEN AND CAROL SKARSTEN.

EAJA-FSA Docket No. 1999EEA0215.

Order Denying Respondent's Petition for Reconsideration and Order Granting Applicants' Petition for Reconsideration and Correction filed July 6, 2000.

Petition for reconsideration – Mistake of law and legislative history — Correct Computation and Mathematical for Fees and expenses – Noncompliance with Regulations.

The Director, National Appeals Division (NAD)[Secretary of Agriculture delegated Equal Access to Justice Act (EAJA) authority to Director by memorandum dated June 14, 1999], denied Respondent's Petition for Reconsideration. The NAD Director held that the legislative history had no determinative effect as the May 10, 2000 Decision and Order reflect that the Applicants were the prevailing parties and the government did not show substantial justification. Further, the Agency admitted error in not complying with published regulations, as stated in 7 C.F.R. 1922.201 (1999), requiring compliance with the Uniform Standards of Professional Appraisal Practice.

The Director granted Applicants' request to correct the computation and mathematical errors in awarding fees which changed the total amount awarded Applicants from \$5,398, as stated in the May 10, 2000, Decision and Order, to \$5,616.

Alice A. Peterson, for Respondent.

Brian L. Boysen, Appleton, Minnesota, for Applicant.

Karen R. Kkrub, Appleton, Minnesota, for Applicant.

Initial decision issued by Michael W. Shea, Adjudicating Officer.

Decision and Order issued by Norman G. Cooper, Director, National Appeals Division.

Sanford Skarsten and Carol Skarsten [hereinafter Applicants] instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504 (1994 suppl. 3)) [hereinafter EAJA] and the Procedures Relating to Awards under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203 (2000)) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture [hereinafter USDA], National Appeals Division, [hereinafter NAD], on August 7, 1999.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, in which Applicants appealed the decision by the Farm Service Agency [hereinafter FSA], USDA [also hereinafter Respondent], as to payment under a Shared Appreciation Agreement; (2) Applicants request the award of appraisal fees and expenses of \$1,210 be affirmed; and (3) Applicants request that the denial of fees as to the organizations providing certain assistance be reversed and that fees be awarded.

On September 9, 1999, Respondent filed an Answer to Application for Fees and Expenses [hereinafter Answer] in which Respondent: (1) denies Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No.

1999E000215; (2) states Respondent's position in the adverse decision appealed from in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, was substantially justified; (3) states Applicants' EAJA Application does not comply with the requirements of EAJA or the EAJA Rules of Practice; (4) states Applicants request relief that is not available under EAJA; and (5) states Applicants' request for fees is not supported by documentation.

Applicants filed their response to Respondent's Answer on September 23, 1999.

On November 5, 1999, Michael W. Shea, Hearing Officer, NAD, USDA, serving as EAJA Adjudicating Officer, issued an EAJA Determination [hereinafter Initial Decision and Order] in which he determined that: (1) Applicants filed a complete and timely EAJA Application (Initial Decision and Order at 6); (2) Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215 (Initial Decision and Order at 7); (3) Respondent's actions and decisions were not substantially justified (Initial Decision and Order at 7); (4) the fees and expenses associated with the independent appraisal were reasonable (Initial Decision and Order at 7); and (5) the fees requested for services provided to Applicants by two legal service attorneys, one legal service paralegal and one farm advocate were denied (Initial Decision and Order at 6).

On December 7, 1999, Applicants appealed to the Director, NAD;¹ on December 27, 1999, Respondent filed a Response in Opposition to Appeal Petition of the Applicants, and on January 10, 2000, Applicants submitted a Reply Memorandum in Support of Appeal Petition.

On May 10, 2000, a Decision and Order [hereinafter Decision and Order] was issued affirming the Adjudicating Officer's determination as to prevailing party, substantial justification and appraisal fees; reversing the Adjudicating Officer's denial of fees for expenses of the legal service organizations and paralegal service; and awarding fees in the amount of \$5,398 of which \$1,210 was for real estate appraisal fees and expenses.

Section 1.146(a)(3) of the Rules of Practice Governing Form Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) Petition requisite. . . .

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the*

¹The Secretary of Agriculture delegated EAJA authority to the Director, NAD by memorandum dated June 14, 1999.

decision of the Judicial Officer. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matter claimed to have been erroneously decided and alleged errors must be briefly stated.

On May 19, 2000, Applicants filed a letter and Petition for Reconsideration and Correction [hereinafter Petition for Reconsideration and Correction]; on May 22, 2000, Respondent filed Government's Petition for Reconsideration of the NAD Director's Decision and Order [hereinafter Government's Petition for Reconsideration]; on May 26, 2000, Applicants filed a Response to Government's Petition for Reconsideration; and on the same day, the Respondent filed a letter in response to the Applicants' Response to the Government's Petition for Reconsideration.

Applicants' Petition for Reconsideration and Correction seeks to modify fees computed for Brian L. Boysen and correct a mathematical error in the total hours for Paul Mahoney. Applicants point out that the affidavit submitted by Brian L. Boysen for legal services was in decimal format. For example, on April 6, 1999, the hours should be 1.5 hours instead of 1 hour and 50 minutes. Correcting the entries on page 14 of the Decision and Order into the decimal format results in a total of 17.25 hours instead of 17 hours and 25 minutes. Therefore, multiplying 17.25 hours times \$125 results in \$2,156.25, instead of the \$2,188 stated in the Decision and Order.

For the award of fees for Paul Mahoney, Applicants point out that on page 14 of the Decision and Order, the total hours are 27 hours and 50 minutes. The total hours approved are 29 hours and 50 minutes, rounded to 30 hours. Multiplying 30 hours times \$50 per hour results in a total of \$1,500 instead of the \$1,250 stated in the decision.

Applicants request that with the correction of the computation and mathematical errors, the total awarded would be \$5,616, rounded to the nearest dollar, of which \$4,406 is for the fees and expenses for legal service and other representation and \$1,210 is for the award of real estate appraisal fees.

Applicants' request to correct the computation and mathematical errors in awarding fees for Brian L. Boysen and Paul Mahoney is consistent with the intent of the Decision and Order. Therefore, Applicants' Petition for Reconsideration and Correction is granted.

Respondent raises the issues that (1) the substantial justification analysis of the decision misstates the law and its legislative history and (2) that the Decision and Order concludes that the Agency did not comply with its regulatory requirements, without stating which regulations the Agency did not follow.

Respondent notes that the Decision and Order, at pages 7 and 8, *Cornella v. Schweiker*, 728 F. 2d 978 (8th Cir. 1984) states that "the legislative history of EAJA

establishes a presumption that the government's position was not substantially justified if it loses the case". Respondent points out that EAJA legislative history establishes just the opposite. Respondent adds that the legislative history of EAJA provides that it is intended to award fees where the government has coerced compliance with its position. H.R. Rep. No. 96-1418 (1980) as reprinted at 1980 WL 12964 at page 5. However, the legislative history of EAJA had no determinative effect, as the Decision and Order correctly reflects, based on the administrative record, that the Applicants were the prevailing parties and the government did not show substantial justification. Indeed, the Decision and Order fully addresses the reasonableness test, which the Respondent agrees is the proper test of whether or not a government action is substantially justified.

Respondent's position, as to the issue that the Agency did not comply with regulatory requirements, is that the administrative record will show that the Agency did in fact comply with its regulatory requirements. Specifically, Respondent references *Government's Response in Opposition to Appeal Petition* at pages 2 and 3 that states:

In order to determine the amount of appreciation due, if any, under the SAA, the Agency contracted with a state-certified appraiser to complete an appraisal, as required 7 C.F.R. § 1951.914. FmHA Instruction Part 1922 sets forth the requirements that the Agency must comply with relative to appraisals. FmHA Instruction § 1922.10(b) provides that appraisal reviews will be completed as described in the appropriate program review instructions. The instructions for servicing SAAs do not require an appraisal review, however, it is the policy of FSA to complete an administrative review of contract appraisals prior to payment the contract appraiser.

Based on the administrative record and admission that the FSA contract appraiser erred in not complying with published regulations, specifically provisions of 7 C.F.R. § 1922.201 (1999), requiring compliance with the Uniform Standards of Professional Appraisal Practice, a reasonable person would conclude that the government failed to prove that its action was substantially justified. Respondent's argument that the Agency essentially complied with its rules echoes its earlier "no harm, no foul" claim. The failure of an Agency to follow its own regulations in determining the payment under the SAA is not reasonable government action.

For the foregoing reasons, the following Order should be issued.

Order

Applicants' Petition for Reconsideration and Correction is granted and Respondent's Petition for Reconsideration is denied.
